SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

THE AMERICAN SUGAR REFINING COMPANY,
Libellant, Appellant,
AGAINST
The steamship G. R. BOOTH,
WILLIAM H. SAVILLE,
Claimant, Appellee.
No. 156.

On certificate from the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE LIBELLANT.

The court below asks in effect, if an explosion of cargo, which admits sea water into a ship's hold, is a peril of the sea.

The litigation in which this instruction is required is an admiralty suit for damage to sugar. The cause of action arose in 1891, before the Harter Act. The vessel had been laid on the berth at Hamburg, Germany, as a common carrier, taking a general cargo of sugar, salt, cement, and twenty cases of exploders, blasting caps, or detonators—which are used to explode dynamite or gun cotton. The *G. R. Booth* took this cargo to Brooklyn, and some days after arrival, while alongside her wharf, a violent explosion occurred, in the after-hold, No. 4. The ship's plates were burst out, opening a large hole, through which water entered, filling the after-compartments of the ship, including adjoining hold No. 3, where libellant's sugar was melted.

Upon the trial it appeared that three stevedores had been working in No. 4 hold before the explosion. Two of them were killed, and the third had died before trial without having given any evidence.

Upon the bare facts of this explosion, unexplained and un-

accounted for, on whom was the burden of proof? The learned District Judge held:

"The explosion did no direct damage to the sugar, nor in any manner directly affected it. By bursting a hole in the side of the ship, sea water was let into the hold, which subsequently made its way among the sugar and damaged it. Such damage is a sea peril. The *Xantho*, 12 App. Cas., 503, 508. The burden of proof is upon the libellant to show that it might have been avoided by reasonable care."

64 F. R., 879.

A copy of this opinion is printed in the appendix hereto.

Accordingly the libel was dismissed, as libellant was unable to offer any proof of the cause of the explosion.

The libellant having appealed the case to the United States Circuit Court of Appeals, that court, after consideration, has certified the point to this court, requesting its instruction.

The exemptions in the bill of lading relied on were:

"The ship or carrier shall not be liable for loss or damage occasioned by the perils of the sea, or other waters; by fire from any cause or wheresoever occurring; by barratry of the master or crew; by enemies, pirates, robbers or thieves; by arrest and restraint of princes, rulers or people; by explosion, bursting of boilers, breakage of shafts or any latent defect in hull, machinery or appurtenances; by collision, stranding or other accidents of navigation of whatsoever kind."

Whereupon the court asks:

"Whether the damage to libellant's sugar, caused by the sea water which entered the ship through the hole made in her side by the explosion, without her fault, is a 'loss or damage caused by perils of the sea or other waters,' or by 'an accident of navigation of whatsoever kind' within the above-mentioned exceptions in the bill of lading."

The argument in this court will be (I) on the import of the term "perils of sea" in a contract by a common carrier; (II) that damage by explosion is not a sea peril; (III) that an explosion was the cause of this damage; (IV) that this damage was not an accident of navigation; (V) that the English authorities to the contrary are not law here, and (VI) that under the doctrine of sea perils, as declared by the courts of this country, the facts of the case at bar do not bring the carrier within the exceptions of his contract.

I.

The absolute liability of a common carrier for any loss except the act of God and the King's enemies is settled in English law since the reign of Elizabeth.

Thus Lord Coke says:

"But otherwise it is of a carrier, for he hath his hire, and thereby implicitly undertaketh the safe delivery of the goods delivered to him, and therefore he shall answer the value of them if he be robbed of them." 1 Inst., 89.

So Comyns' Digest, Action upon the case against a common carrier (c. 1), says:

"But a ship-master, who undertakes to carry goods safe, must deliver them so, unless damaged by act of God or King's enemies; plaintiff need only prove their good order when delivered on board, and their being damaged when delivered out. *Evidence shall not be allowed to show defendant was careful.* Thus if a puncheon of rum is staved in letting down, or there is a leak, whereby goods are damaged." Vol. 1, p. 212, Ed. Dublin, 1785.

See also Tompkins *v.* *Dutchess of Ulster*, 24 Fed. Cas., 32.

In Nugent *v.* Smith, 1 C. P. Div., 19, 34, where the ship-owner was held liable as carrier for the death of a horse which injured itself by fright, in heavy weather, without any negligence on the part of the vessel, the "act of God" was thus defined by Lord Esher:

"The best form of the definition seems to us to be, that the damage or loss in question must have been caused directly and exclusively by such a direct and violent and sudden and irresistible act of nature as the defendant could not by any amount of ability foresee would happen, or if he could foresee that it would happen, could not by any amount of care and skill resist, so as to prevent its effect. It lies upon the defendant to show that a damage or loss, for which he would otherwise be liable, is brought within this exception."

The Civil law also had this strict liability of carriers. Thus Ulpian:

" Hoc edicto omnimodo qui recepit tenetur, etiamsi *sine culpa ejus* res periit, vel damnum datum est, nisi quod damno fatali contingit." Dig., lib. iv., title ix., § 3.*

The *damnum fatale* allowed to be set up in defense of this obligation *ex recepto* was also variously called—vis major, casus major, vis naturalis, fatum, vis divina, *Θεοῦ βία*, the last showing, even among the earliest seafaring people, a law term curiously identical with the old English phrase, " Act of God."

Vis major is said to be " casus cui humana infirmitas resistere non potest."

Casaregis says:

" Generaliter enim casus fortuitus est accidens, quod per diligentiam curamve mentis humanæ non potest evitari nec prævideri."

Disc. xxiii., 38.

The idea pervading all these definitions is something above and beyond the powers of man—an ictus divinus—of which the examples are lightning, quæ immittitur cœlitus; also storms and visitations of the elements, and " ceterarum calamitatum quæ a cœlo ingruunt." Donnellus, quoted by Exner in Der Begriff der Höheren Gewalt, or vis major, Vienna, 1883.

In Baxter *v.* Leland (1 Abbott Adm., 348), Judge Betts held in 1848, that " dangers of the seas," " perils of the seas," and " dangers of navigation," are practically convertible terms.

This exception of " perils or dangers of the sea," early incorporated in the contract of carriers by sea, has been judicially defined. Mr. Justice Woods in 1873 (then Circuit Judge) said:

" By dangers of the sea are meant all unavoidable accidents from which common carriers, by the general law, are not excused, unless they arise from the act of God."

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* A Scotch commentator says: " The rule is that common carriers, innkeepers and stablers are responsible for the loss of things committed to their charge, although no neglect can be proved, if such loss do not arise from natural and inevitable accident, the act of God or of the King's enemies. This policy was established in Rome by the Praetor's edict. It has been adopted by most of the nations of modern Europe who have recognized the Roman law. In England, it has been referred to the custom of the realm." Bell, Principles of the Law of Scotland, p. 159 (9th ed.).

Preceeding further, he said of the act of God:

"To bring a disaster within the scope of the phrase 'act of God' for the purpose of relieving the common carrier from responsibility, it is necessary to show that it occurred independent of human action or neglect. It is only a natural and inevitable necessity, and one arising wholly above the control of human agencies which constitutes the peril or disaster contemplated by that phrase."

Dibble *v.* Seligson, 1 Woods, 411, 412.

The editors of the American and English Encyclopædia of Law have also adopted this description of perils of the sea, from a New Jersey Court, which defines them as those accidents—

"peculiar to navigation, that are of an extraordinary character or arise from an irresistible force or from overwhelming power which cannot be guarded against by the ordinary exercise of human skill and prudence."

14 Am. & Eng. Ency., p. 323.

Also Holt on Shipping:

"The other terms, 'perils and dangers of the seas and accidents of the seas, rivers and navigation,' are to be understood of all such accidents *as arise from the seas and winds*, and which could not be prevented or avoided by any care, vigilance or skill of the master and mariners; such accidents as are inevitable and in no degree occasioned by the ignorance, wilfulness, or neglect of the navigators." 2d ed., page 412 (London, 1824).

Park, in his Treatise on Insurance, says:

"It may in general be said that everything which happens to a ship in the course of her voyage by the immediate act of God, without the intervention of human agency, is a peril of the sea. Thus, in an insurance against perils of the sea, every accident happening by the violence of winds or waves, by thunder and lightning, by driving against rocks, by the stranding of the ship, or by any other violence, which human prudence could not foresee, nor human strength resist, may be considered as a loss within the meaning of such a policy."

Chap. III., p. 61, 3d Ed. Boston, 1800.

Likewise Marshall:

"Losses by perils of the sea are now restricted to such accidents or misfortunes as proceed from mere sea damage; that is, such as arise *ex vi divina* from stress of weather, winds and waves, from lightning and tempests, rocks and sands," etc.

Treatise on the Law of Marine Insurance, 5th Ed., p. 386.

A further qualification is given by Arnould:

"But the words 'perils of the sea' only extend to cover losses really caused by sea damage or the violence of the elements *ex marinæ tempestatis discrimine;* they do not embrace all losses happening upon the seas, such as may be comprehended under the general sweeping words at the end of the clause, enumerating the risks insured against." 2 Arnould on Insurance, p. 754, 6th Ed., 1887.

Judge Story said:

"The phrase 'dangers of the seas,' whether understood in its most limited sense, as importing only a loss by the natural accidents peculiar to that element, or whether understood in its more extended sense as including inevitable accidents upon that element, must still, in either case, be clearly understood to include only such losses as are of an extraordinary nature, or arise from some irresistible force or some overwhelming power which cannot be guarded against by the ordinary exertions of human skill and prudence."

The *Reeside*. 2 Summer, 571.

In the *Majestic* (166 U. S., 386), this court quoted with approval from Chancellor Kent that the act of God means "inevitable accident without the intervention of man," and that "perils of the sea denote natural accidents peculiar to that element which do not happen by the intervention of man nor are to be prevented by human prudence." The Chief Justice, however, added:

"The words 'perils of the sea' may indeed have grown to have a broader significance than the act of God, but that is unimportant here."

In the *Mohler* (21 Wall., 230, 233), where a vessel collided with a bridge, Mr. Justice Davis, delivering the opinion of the court, said:

"It is insisted that the loss occurred through a peril of navigation, which was one of the exceptions contained in the bill of lading, and that therefore the carrier was excused from a delivery of the wheat. *The burden of proof lies on the carrier*, and nothing short of clear proof, leaving no reasonable doubt for controversy, should be permitted to discharge him from the duties which the law has annexed to his employment."

It also follows that these exceptions inserted by the carrier in his contract are to receive a strict construction.

Thus, in Holt on Shipping, the case of Smith *v.* Shepard, is mentioned where "perils of the sea" were strictly limited so as not to include stranding on a sandbank.

"After the decision of that case, the exception was enlarged into the more ample terms 'all accidents of the seas, rivers and navigation, etc.' But as this precautionary notice is in direct derogation of the liability imposed upon the ship owners by the common law, the Courts will not give it a larger interpretation than the force of the terms necessarily requires. Where the law has imposed a certain duty and a certain degree and kind of responsibility upon certain functions, for reasons of public convenience, a diminution of this responsibility is a manifest opposition to the reason and purpose of the law; and it would seem upon principle that the law should neither permit it, or at least should restrain such private limitations within the narrowest terms" (p. 416).

This principle of strict interpretation is generally observed by commercial and maritime Courts. Thus, the headnote of a decision of the tribunal of commerce at Antwerp is:

"Les clauses d'exonération doivent être entendues dans le sens le plus strict. Spécialement lorsque l'armateur s'est exonéré de la baraterie du capitaine et des fautes de navigation, il demeure responsable du défaut de fermeture d'un robinet d'alimentation du lest d'eau, ces deux faits ne constituant ni une baraterie ni une faute de navigation."

The clauses of exoneration should be taken in the most strict sense. Especially when the carrier has exonerated himself from the master's barratry and faults of navigation, he is still liable for the defect in closing the cock of a feed pipe for the water ballast, as these two things do not constitute either barratry or a fault of navigation.

Revue Internationale du droit maritime, vol. VIII, p. 140.

The same doctrine has obtained in France, where these clauses are recognized as in derogation of the common law (étant restrictive du droit commun, doit être prise dans son sens le plus étroit).

Revue Internationale du droit maritime, vol. X., p. 207.

This Court appears early to have announced like principles as to contract exemptions from the duties of common carriers:

"The exemptions from these duties should not depend upon implication or inference, founded on doubtful and conflicting evidence, but should be specific and certain, leaving no room for controversy between the parties."

New Jersey S. N. Co. *v.* Merchants' Bank, 6 Howard, 344, 383.

In Compania de Navigacion la Flecha *v.* Brauer, decided October 25th last, Mr. Justice Gray said:

"Exceptions in a bill of lading or charter-party, inserted by the ship owner for his own benefit, are unquestionably to be construed most strongly against him."

II.

A damage from explosion is not a loss by perils of the sea.

The *New World v.* King, 16 Howard, 469, 476.
Buckley *v.* Naumkeag Co., 1 Cliff., 322, 324, affd., 24 Howard, 386.
The *Mohawk*, 8 Wall, 153, 162.
Dunlap *v.* The *Reliance*, 2 F. R., 249.
Posey *v.* Scoville, 10 F. R., 140.
Rose *v.* Stevens Condit Co., 11 F. R., 438.
The *Sydney*, 27 F. R., 123.
Grimsley *v.* Hankins, 46 F. R., 400.
Warn *v.* Davis Oil Co., 61 F. R., 631.

In the present case the process of discharging was under the control of the vessel, and the casualty was such as in the ordinary course of hoisting out cargo does not happen if reasonable

care is used. In the absence of explanation by the claimant such an accident cannot be deemed inevitable.

Inland Co. *v.* Tolson, 139 U. S., 555.
See also Breen *v.* N. Y. Central R. R., 109 N. Y., 297.

In the leading case, this Court decided that a carrier having an explosive in leased premises without knowledge of its character, and with no attending circumstances awakening suspicion as to the danger of the article, is not liable to the landlord for damages resulting from an explosion. But in the same case, Mr. Justice Field distinguished the right of a shipper against a carrier from that of a third party who might be injured :—

"The cases between passengers and carriers for injuries stand upon a different footing. The contract of the carrier being to carry safely, the proof of the injury usually establishes a *prima facie* case, which the carrier must overcome. His contract is shown, *prima facie* at least, to have been violated by the injury."

The Nitro-Glycerine Case, 15 Wall., pp. 524, 537, 538.

III.

The idea that contact of sea water with cargo makes a *prima facie* sea peril, without regard to the way the water made its entry into the ship, is not the law of this court.

This inflow of water is not a *cause*. It is itself a natural result of the bursting of the ship's side below the load-line. The real cause is the explosion which opened the bilge plates.

This is the main point in the case.

Can the legal investigation stop at the fact of this sudden inflow of water, and the attention of the court be thereby diverted from the proper inquiry as to the agency that admitted the water through the steel sides of the ship?

The doctrine of *causa proxima*, as applied to the legal scrutiny of the antecedents of such a casualty, requires at least a *cause*. If in the train of events there are different causes found, then the courts regard as the cause of the loss

"the predominating efficient cause"—or that by which the operation of the other is directly occasioned.

Thus Phillips says:

"The commonplace maxim that in cases of doubt to which of two or more perils a loss is to be assigned, *causa proxima non remota spectatur*, has not been infrequently resorted to, by which was meant originally, at least, that a loss is to be attributed to the peril in activity at the time of the ultimate catastrophe when the loss is consummated. But much of the jurisprudence is contrary to the maxim taken in this sense, and it seems rather to divert attention from the proper inquiry and to becloud instead of elucidating the subject. I understand the result of the jurisprudence to be that: *In case of the concurrence of different causes, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it is, or is not, in activity at the consummation of the disaster.*"

Phillips on Insurance, §1132.

This principle has been established by repeated decisions of this court. It is therefore unnecessary to discuss further the somewhat subtle and scholastic distinctions in the metaphysical realm of causation.

In Insurance Co. *v.* Tweed (7 Wall, 44) cotton was insured against fire, the contract excepting fire which might happen by means of explosion. An explosion took place in a building causing a fire which was communicated by the wind to a second building and thence to the building containing the insured cotton.

Mr. Justice Miller said:

"The only question to be decided in the case, is whether the fire which destroyed the plaintiff's cotton happened or took place by means of the explosion; for if it did, the defendant is not liable by the express terms of the contract. That the explosion was in some sense the cause of the fire, is not denied, but it is claimed that its relation was too remote to bring the case within the exception of the policy. And we have had cited to us a general review of the doctrine of proximate and remote causes, as it has arisen and been decided in the courts, in a great variety of cases. * * * One of the most valuable of the criteria furnished us by these authorities, is to ascertain whether any *new* cause has intervened, between the fact accomplished and the alleged cause. If a *new* power has intervened, of itself sufficient to stand as a

cause of the misfortune, the other must be considered as too remote. *In the present case we think there is no such new cause.* The explosion undoubtedly *produced* or *set in operation* the fire which burned the plaintiff's cotton. * * * We are clearly of the opinion that the explosion was the cause of the fire in this case."

In Milwaukee Co. *v.* Kellogg (94 U. S., 470)—an action for setting fire to plaintiff's mill by a fire communicated by a steamer through an intervening elevator—Mr. Justice Strong, delivering the opinion of the Court said:

"The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments as an article at the end of the chain may be moved by a force applied at the other end, that force being the proximate cause of the movement. * * The inquiry must always be whether there was any intermediate cause disconnected with the primary fault and self-operating which produced the injury."

In Insurance Co. *v.* Boone (95 U. S., 130), the Insurance Company contracted to indemnify the plaintiff against loss or damage by fire, provided it should not be liable to make good any loss or damage which may happen or take place by means of any military or usurped power, etc. It was found that certain military stores in an adjoining building were set fire to by a U. S. officer to prevent them from falling into the hands of the rebels, and that the fire spread to, and consumed the property insured. On these facts, the inquiry was whether the rebel military power was the predominating and operative cause of the loss.

Mr. Justice Strong said:

"The question is not what cause was nearest in time or place to the catastrophe. This is not the meaning of the maxim, *causa proxima non remota spectatur.* The proximate cause is the efficient cause—the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are *independent* of each other that the nearest is of course to be charged with the disaster. * * * the conclusion is inevitable, that the fire which caused the destruction of the plaintiff's property happened or took place, not merely in consequence of,

but by means of the rebel invasion and military or usurped power. The fire occurred while the attack was in progress and when it was about being successful. The attack, as a cause, never ceased to operate until the loss was complete. It *was the causa causans which set in operation every energy that contributed to the destruction.* * * * The court below regarded the action of the United States military authorities as a sufficient cause intervening between the rebel attack and the destruction of the plaintiff's property, and therefore held it to be the responsible proximate cause. With this we cannot concur. The proximate cause, as we have seen, is the predominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in time and place of the loss."

The doctrine that the inflow of sea water through the side of the *G. R. Booth* amounted to a sea peril was rejected by this court in 1837. In Waters *v.* Merchants' Louisville Co., (11 Peters, 213), the question of a loss by explosion and the barratry of the officers was certified to this court.

Mr. Justice Story said:

"We have no hesitation to say that a loss by fire caused by the barratry of the master or crew is not a loss within the policy. Such a loss is properly a loss attributable to the barratry as its proximate cause as it occurs as the efficient agent, with the element *eo instanti*, when the injury is produced. If the master or crew should barratrously bore holes in the bottom of the vessel and the latter should thereby be filled with water and sink, the loss would properly be deemed a loss by barratry and not by a peril of the seas or rivers, *though the flow of the water should co-operate in producing the sinking.*"

The precise case of damage to wheat from the inflow of seawater through holes barratrously bored in the ship came before Sir R. Phillimore in 1875. It was contended that seawater being the direct cause of the damage, the loss must be ascribed to dangers of the seas, which were excepted in the bill of lading. The Court held this contention unsound, and said:

"Common sense and the interests of navigation seem to render it desirable that courts of law should not include barratry within the exception of 'dangers or perils of the seas,' and the entire tenor of the decisions justifies me in refusing so to include it." The *Chasca*, L. R., 4 A. & E., 446, 449.

Other cases are:

Dole *v.* New England M. I. Co., 2 Clifford, 394.
Brown *v.* St. Nicholas Ins. Co., 61 N. Y., 332.

Where the engineer of a steamer let sea-water into a vessel, whereby she was run ashore and subjected to salvage, this was not treated as a peril of the sea. On the contrary, Judge Blatchford said:

"This view brings the entire case within the well settled principle that in case of loss or damage to goods, covered by a bill of lading, the presumption of the law is that such loss or damage was occasioned by the act or default of the carrier, and the burden of proof is upon the carrier to show that it arose from a cause for which he is not responsible." The *William Taber*, 2 Ben., 329 (1868).

In the *Exe* (14 U. S. Appeals, 627,631), a cargo of tea was damaged by the bending of an upright hold stanchion and breaking of a bolt leading from the foot of the stanchion into a ballast tank, which caused water to escape and damage the tea. The steamer proved heavy weather on her voyage.

Judge Wallace said:

"We conclude, therefore. that the primary cause of the loss was the excepted cause, the violent seas *which set in motion the train of events, that resulted in the entrance of the water into the hold*, and the injury of the cargo."

In Cullen *v.* Butler (5 Maule & S., 461), a ship was fired on by mistake, and the inflow of water caused her to sink. This was held not a peril of the sea, but the loss was considered to come under the general words of the policy "all other losses, misfortunes," etc.

IV.

Neither is such an explosion an accident of navigation, within the exceptions of the bill of lading.

No such contention would probably be made, had it not set in operation the inflow of water to the sugar.

In case of the British steamer *Bedouin*, the Appellate Court

in Bremen had the case of a cotton cargo damaged by bilge-water on the voyage. It was claimed that the damage arose from sea water shipped on the voyage. The consignee withheld the freight, and the master brought suit, in which this cargo damage was counterclaimed.

The bill of lading excepted collision, stranding or other perils of the seas, rivers or navigation of whatever nature or kind soever.

After deciding that the damage was due to bilge water, from which the cargo should have been protected, the judgment continued:

Nun erachtet freilich der klägerische Anwalt die Rhederei des "Bedouin" um deshalb für frei von Schadensersatz, weil des Connossement ja doch besage, dass das Schiff nicht hafte für perils of the seas. Allein dieser Gesichtspunkt entfällt schon an und für sich um deshalb, weil die Freizeichnung von Schäden from perils of the seas nichts anderes besagen will, als dass der Capitain für diejenigen Schäden, von welchen die Schiffsladung durch elementare äussere Ereignisse, wie sie die Seeschifffahrt im Gefolge habe, und durch welche die glückliche Ueberkunft des Schiffes mit seiner Ladung gefährdet werde, und zwar auch dann nicht aufkommen wolle, wenn er dabei in Mitschuld sei. Hiervon kann aber nicht dann die Rede sein, wenn, wie hier, es sich um eine Beschädigung der Ladung handelt, die nicht aus elementaren, das Schiff betroffen habenden Ereignissen sondern daraus resultirt, dass das gewöhnliche Bilgenwasser das Schiffes mit der Ladung in Berührung gekommen ist. In concreto er-

The plaintiff's counsel indeed considers the owner of the "Bedouin" free from liability because the bill of lading, reads, that the ship is not liable for perils of the seas. But this view falls to the ground of itself, for the reason, that the exemption from damages by peril of the seas, means only that the master shall not answer for those damages to which the cargo is subject by events from external action of the elements, such as attend navigation, and which endanger the safe arrival of the vessel with its cargo, and not even then if in respect thereof the master is in contributory fault. But there can be no such question, if, as here, it concerns cargo damage not caused by action of the elements which have affected the ship, but instead the damage is from ordinary bilge water coming in contact with the cargo.

giebt sich aber dies Verständniss der "perils of the seas" auch daraus, dass dieser Begriff in dem Connossement mit dem der collision und des stranding durch die Worte, 'collision, stranding or other perils of the seas' in Verbindung gebracht, also eben nur an Ereignisse elementarer Natur dabei gedacht ist.

In this special case this construction of perils of the sea is also evident, because this term is used in connection with collision and stranding in the clause 'collisions, stranding or other perils of the seas,' hence only an event in the nature of the action of the elements is thereby intended.

Hanseatische Gerichtszeitung, 17 Nov., 1886, p. 276.

V.

The later English decisions, enlarging the import of the term "perils of the sea," in a bill of lading, and reversing the former canons of construction of those contracts, will not be followed by this Court.

Up to 1868 the decisions of these two commercial countries were in substantial harmony as to the duties and obligations of common carriers at sea. The authority of Story, Parsons, and of the decisions of this Court was recognized at Westminister Hall. It was acknowledged that in the carrier's contract the term perils of the sea was introduced by the carrier for his benefit, and as an exception from the fundamental duties of his undertaking. In a policy of insurance, on the other hand, losses by perils of the sea were regarded as the substantial grounds of indemnity; indeed, the insurer went further and undertook to stand liable for all other perils of like nature. Even if these different undertakings had been alike in their origin, the terms of insurance policies grew gradually more comprehensive until they even embraced casualties on land to docked vessels, so that Courts had seldom to ask the precise meaning of the term perils of the sea alone, when the following general words clearly covered such an insurance loss. In 1843 these differences were stated by Mr. Justice Story:

"The rules which regulate losses under policies of insurance are by no means the same as those which either neces-

sarily or ordinarily govern in cases of common carriers. Each contract has its own peculiarities and principles of indemnification ; and it is not safe in many instances, to reason from one to the other. In cases of collisions of ships, for example, the loss is treated as a peril of the seas, whether caused by accident or by the fault of one party or of both parties. But whoever heard that a carrier was exempted from any loss caused or occasioned by the negligence of himself or his servants ?"

King *v.* Shepard, 3 Story, 349, 360.

The disaster to the steamship *Black Prince* and her cargo by collision with the *Araxes*, in 1860, brought up the liability of the owners of the *Black Prince* in actions by the cargo on the bills of lading which read "accidents or damage of the seas, rivers and steam navigation, of whatever nature or kind soever, excepted."

In three different English courts these cargo suits resulted against the shipowner, notwithstanding the claim made that the bill of lading covered the loss.

Lloyd *v.* General Iron Screw Collier Co., 3 H. & C., 284. (1864.)
Grill *v.* Same, L. R., 1 C. P., 600. (1866.)
Same *v.* Same, L. R., 3 C. P., 476. (1878.)

The law of this country was followed on the point that perils of the sea did not have the same effect in an insurance policy and in a bill of lading.

Mr. Justice Willes said in the Common Pleas :

"Secondly a new trial is asked for on the ground that the loss was caused by a peril of the sea. This has already been decided in the Court of Exchequer, in an action arising out of the same accident, and turning on the construction of the same document, and the decision is supported by that of this Court in Phillips *v.* Clark. As, however, reference has been made to cases on policies of insurance and the interpretation that has been given to them, I may say that a policy of insurance is an absolute contract to idemnify for loss by perils of the sea, and it is only necessary to see whether the loss comes within the terms of the contract and is caused by perils of the sea ; the fact that the loss is partly caused by things not distinctly perils of the sea does not prevent its coming within the contract. In the case of a bill of lading, it is

different, because there the contract is to carry with reasonable care, unless prevented by the excepted perils. If the goods are not carried with reasonable care and are consequently lost by perils of the sea, it becomes necessary to reconcile the two parts of the instrument, and this is done by holding that, if the loss through the perils of the sea is caused by the previous default of the shipowner, he is liable for this breach of his covenant." 1 C. P., 611.

These decisions, though strictly consonant with the then unbroken current of Anglo-American authority, aroused great opposition among the influential British shipping interests.

A distinguished English authority writes in 1891:

"I believe that it was not until the year 1866, when the case of Grill *v.* General Iron Screw Company (better known in the shipping world as the case of the '*Black Prince*') was decided, that the attention of merchants, underwriters and shipowners was brought to the fact that an exception in a contract of affreightment of 'perils of the sea,' or of 'dangers of navigation,' or of 'accidents of whatever nature or kind,' or other similar expression does not afford any defense to a claim against a shipowner for loss of cargo caused by negligence in navigation.

"From that time dates a struggle which lasted for many years between the three parties interested; first, as to the meaning which should be attributed by the Courts to the various terms employed by the shipowner to restrict his liability, and, secondly, as to the form which the contract ought, in fairness and with due regard to mercantile convenience, to assume. As case after case was decided, fresh words were introduced by the shipowner to meet the new liabilities which revealed themselves to his mind, or old phraseology which had been found insufficient was amended; and often in either case fresh disputes arose as to the effect of the alterations."

Restrictions by Contract upon the Liability of Shipowners as Carriers of Goods, by J. E. Gray Hill (Liverpool) London, 1891, (p. 2).

The "struggle" as to the form of the contract resulted in the ready insertion by shipowners of the words "collisions, strandings," etc., and the further negligence clause, exonerating the carrier for these accidents, even when occasioned by the negligence of the carrier's servants.

As early as 1869 this clause was declared valid by Sir R.

Phillimore, although in a case of conceded bad stowage of cargo.

The *Duero* L. R., 2, A. & E., 393.

Thereby the heart was steadily eaten out of the obligation of the common carrier, until these various clauses had left him under no implied duty as to the navigation and management of the ship.

In 1883 the English Court of Appeal frankly stated the purposes of these negligence clauses. After referring to the *Black Prince* cases, Mr. Justice Brett, now Lord Esher, said, according to the first report in Aspinall Maritime Cases:

"In order to meet this, the shipowners in the present case have insisted on the stipulation excepting loss resulting from the default of their servants, and this was assented to by the shippers. *The liability of the shipowner in this implied contract is therefore eliminated*, and he cannot be held liable for a loss occasioned by the negligence of his servants, whether the loss was the immediate result of a collision or not."

Chartered Mercantile Bank of India *v.* The Netherlands Steam Nav. Co., 5 Aspinall, 65.

The official report uses slightly different language. Instead of the italicized lines, the opinion says:

"And, therefore, under this bill of lading, that liability which was held to exist against the shipowners in Lloyd *v.* General Iron Screw Collier Co. is negatived, and the defendants cannot be held liable for the loss caused by the negligence of their servants on board the navigating ship, whether or not that loss is the immediate result of a collision or not. Therefore, under this bill of lading, the plaintiffs cannot rely upon the implied contract on the part of the shipowners, that the goods shall be carried with reasonable care and skill by their servants."

L. R. 10 Q. B. D., 532.

Under the other head, the judicial construction of the exceptions in a bill of lading, the English shipowners' struggle has been slower, but seems now to be equally successful in their effort to reverse the established law of their liability.

Not only did the House of Lords reverse the rule that collisions were not a "peril of the sea" within the terms of a bill of lading, and hold that its purport was the same as in policies

of insurance (The *Xantho*, 12 App. Cas., 503), but they have proceeded to the point of holding that, for the purpose of exonerating shipowners, a peril of the sea can be extended to cover any damage occurring at sea, or whereby the injury is attended with sea water.

Pandorf *v.* Hamilton, 12 App. Cas., 518.

In that case rats eating through a pipe connecting with the side of the ship admitted sea water, the inflow of which damaged the cargo.

These extraordinary decisions have really superseded in England the necessity for the long enumeration of excepted causes of damage which the shipowner was previously advised to insert in his contract. Anything happening at sea or attended with sea water is thus excepted by this interpretation, and the merchant is left to reconcile his business, as best he may, with this surprising reversal of judicial precedent.

These decisions will not be followed by this Court, because:

1st. Our jurisprudence has refused to bend itself at the behest of the shipowner, but instead has insisted on preserving the carrier's fundamental duty to use due care, and holds him to his obligation *ex lege*.

2d. This Court, even in insurance cases, has never adopted the narrow view of *causa proxima* that is current in England, which stops the investigation into the real causes of a casualty.

3d. This Court has never retracted the position that the obligation of a carrier and the exceptions against perils of the sea, inserted for his own benefit, are quite diverse from the indemnity contract against those perils made by an insurer.

4th. The idea of sea perils in an insurance policy, however uncertain in England, here means perils by natural action of the elements, not any damage on the sea, nor any damage attended with sea water.

This was settled in Hazard Admr. *v.* New Eng. Marine

Insurance Co., 8 Peters, 557, 584, where Mr. Justice McLean delivering the opinion, said :

"In an enlarged sense, all losses which occur from maritime adventures may be said to arise from the perils of the sea; but the underwriters are not bound to this extent. They insure against losses from extraordinary occurrences only, such as stress of weather, winds and waves, lightning, tempests, rocks, etc."

The case of Garrigues *v.* Coxe, 1 Binney, 592, where rats had eaten the inside of a ship, causing her condemnation, was then pressed upon this Court, which declined to follow it.

Yet this Pennsylvania decision, discredited by this Court and contrary to all the fundamental authorities, was adopted and followed by the Lord Chancellor (12 App. Cas., 530).

In Merrill *v.* Arey, 2 Ware, 215; 17 Fed. Cas., 83, Judge Ware said of dangers of the seas :

"I think also it would be most in harmony with the general inclination of American courts to interpret this phrase, as including only dangers that *arise from the action of the elements*, and the dangers incident to that cause, rather than to include *all that arise on the sea.*"

5th. It is elementary law that once the carrier has brought the damage within the exception, the burden of proving antecedent neglect is shifted to the plaintiff. By these various clauses introduced in the bill of lading and sanctioned by the English courts this question of negligence is wholly withdrawn. The bare proof of a collision, stranding or other like casualty excuses the carrier from all liability. The restrictions working from within the contract have corroded and destroyed the substantial duties of the carrier, until only a mere shell of obligation remains. Yet this is effected by a strange legerdemain with standard commercial forms, giving a new use to old words, after their meaning had been hallowed by centuries of commercial usage.

The Master of the Rolls wisely said, in opposition to this violent change:

"Where documents are in daily use in mercantile affairs without any substantial difference in form from time to time, it is most material that the construction which was given to them years ago and which has from time to time been accepted in the courts of law and in the mercantile world should not be in the least altered, because all subsequent contracts have been made on the faith of these decisions." * * *

"One would expect to find in America the same law as in England, because the American people of business have adopted the same forms of bills of lading and of policies and of charter parties that we have ourselves. In the case of Hazard, Administrator, *v.* N. E. Marine Ins. Co., the damage was caused by worms. The Judge directed the jury that if 'they should find that on the Pacific Ocean worms ordinarily assail and enter the bottoms of vessels, then the loss of a vessel destroyed by worms would not be a loss within the policy.'"

17 Q. B. Div., 674, 678.

6th. If the law of perils of the sea be in need of alteration the action of Congress may be relied on. Least of all should this Court depart from its ancient standards to follow this "struggle" of the English courts to appease those interests whose influence brought about such a revolution in the canons of commercial law. By public legislation the merchant and shipowner are on an equal footing, and a new force is not given to set words without fair notice to both parties to the contract.

VI.

In the case at bar, the carrier has not brought the *cause* of libellant's damage within the exceptions of his contract.

This is because (*a*) exceptions in the contract are *causes*, not kinds, of resulting damage; and perils of the sea as a cause requires an external force, as distinguished from a danger from within the cargo; (*b*) the inflow of water was a self-operating, instantaneous result of the explosion, which, as a single, progressive, uninterruped destroying effect, consumed the sugar without the intervention of any *new* cause; (*c*) the assumption of freedom from fault cannot absolve the carrier from his obligation; (*d*) the casualty did not occur during a voyage, but after the transit had ended; (*e*) damage by one kind of cargo to another on a general ship cannot be ascribed to perils of the sea; (*f*) to presume that the shipper agreed to such a novel extension of the established scope of sea perils is as violently improbable as it is a gross violation of the canons of construction of such contracts.

These will be considered separately.

(*a.*) The enumerated exceptions in the bill of lading are not a list of the different sorts of damage. They are a statement of the *causes* that may occasion damage. The carrier must trace the damage to the excepted *cause;* otherwise he remains liable.

It has already been shown that an explosion is the cause of this damage, and that by a course of decisions such an explosion is not to be deemed a peril of the sea. This explosion was of cargo taken on board by the carrier with means of full knowledge of its character. The danger risk or peril was from within the ship, and had no concern with its navigation. It was not an *extraria vis* but an interior danger, which proper packing and careful handling had been supposed to reduce to a minimum.

(*b.*) The explosion made an opening in the side of the ship so far below the load-line, and of such size, that the water of the dock entered in great volume. There was no *new* cause. This inflow was a self-operating, instantaneous result of the

bursting out of the ship's side. The consequences were equally a saturation of all cargo in the lower holds of the ship and the blowing to minute fragments of the merchandise closer to the detonators. The two stevedores near the hatch were instantly destroyed. No *new* cause, influence or means was interposed between (1) the explosion of the fulminate and the destruction of the adjoining merchandise which it scattered, or (2) the bursting off of the plates and flood of water, let into the sugar, to which any efficiency towards, or any responsibility for, the loss can be imputed.

If the blasting caps had exploded in the forehold against a filled water ballast tank in the fore-peak, would the case have been different? Water ballast, instead of outside sea water, would then have flooded the cargo. How could this agency change the legal character of the damage? In the supposed case, as in the case at bar, it would be a damage occasioned by explosion. Whether the *medium* of its destructive effect be atmospheric gases, fresh water escaping through a tank, or sea water rising from the bottom of the ship, the *cause* remains the same. It is a loss occasioned by perils *of the cargo*, and by nothing else.

(*c.*) Had the action been for a maritime tort, the finding of the court that no neglect was shown on the part of the vessel might have absolved the owners. But here the question is not of fault, but of the true performance of the common carrier's special obligation. His fault is immaterial. In frequent instances the courts have declared the carrier by sea to have been without the slightest negligence and yet responsible for non-delivery of the cargo that has been entrusted to the vessel.

> Hyde *v.* Trent Navigation Co., 5 Durnford & E., 389.
> Nugent *v.* Smith, L. R., 1 C. P. Div., 19.

Furthermore, the finding that the carrier was without fault is from the viewpoint of presumptions. The libellant was required to prove fault upon the theory that the loss was occasioned by sea perils. In order to have the point of law definitely settled whether such an accident by explosion of cargo was strictly perils of the sea, necessarily the court below had to negative fault in their proposition, otherwise no legal instruction of this court could be asked.

The finding of the court speaks of the danger in handling and transporting these detonators or blasting caps, although the regulations of Germany had been adopted and enforced for the purpose of eliminating this risk.

These detonators are used for exploding dynamite or gun cotton, and are intended to act as a more sensitive primer to start and intensify other explosives.*

The district judge ascribed this explosion to the detachment of the fulminate from within the caps (See opinion, Appendix). This court, however, has since found that even jarring, heat and concussion may produce an explosion of such blasting caps.

Mather *v.* Rillston, 156 U. S., 391.

(*d.*) The casualty did not occur on the voyage. It was not in the course of navigation. The transit had ended. For several days the steamer had lain motionless and inert at her wharf in an interior basin. The acts bringing about the explosion had no connection with the management or equipment of the ship, or the use, repair, or overhauling of any of its sea appliances.

The labor being done was that of stevedores. Their work was formerly treated as non-maritime and creating no lien, because their service is, as Mr. Justice Grier said, "completed before the voyage is begun, *or after it is ended*," 1 Wall Jr., 370. If handling cases of merchandise is a risk on a ship, it is equally such on a dray, car, or warehouse or in a shop.

The case may be distinguished from certain English decisions which extend accidents of navigation to those mistakes and neglects of the engineering department in opening valves, cocks, tanks, or pipes, after the vessel has arrived, as all these accidents are connected with the navigation appliances, and

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* Military authorities sometimes call them "detonating primers."

"Mr. Alfred Nobel, a Swedish engineer, while endeavoring to employ nitro-glycerine for practical purposes, found considerable difficulty in exploding it with certainty. He at length, in 1864, by using a large percussion cap charged with fulminate of mercury, obtained an explosion of great violence. This result led to the discovery that many explosive substances, when exploded by means of a small quantity of a suitable initiatory explosive, produce an effect far exceeding anything that can be attributed to the ordinary combustion, however rapid of the body in question." Farrow, Mil. Ency., Vol. I, p. 597.

hence may be covered by a broad interpretation of the usual clause.

(*e.*) In a general ship the damage of one part of the cargo to another can never be attributed to a peril of the sea unless first initiated by some external cause.

An illustration is sensitive tea, injured by chemicals in an adjacent package, the noxious chemical effects and character of the package not being known to the carrier. Here the carrier may be without fault, but his liability is nevertheless clear.

Another illustration is a fire started by the bursting of casks containing chloride of lime.

Although the carrier was not guilty of any fault, he was held responsible for this fire damage to other cargo. It did not appear that the bursting had any connection with the *handling* of the goods, as in this case. The decision is that such an accident, not being a *cas fortuit*, does not relieve a carrier at sea.

Brousseau *v.* The *Hudson*, 11 La. Ann. 427.

In the case at bar likewise the blasting caps have damaged other cargo, and this court cannot draw the over-fine and meaningless distinction between the equally direct consequences of rending to fragments and saturation and melting.

Clearly it is *perils of cargo*, instead of perils of the sea, by which this loss is caused.

(*f.*) From a practical point of view, the shipper cannot be presumed to have agreed that such an accident as this should relieve the carrier. All bills of lading contain warnings and notices to shippers as to noxious explosives and inflammable goods. Other shippers of lawful merchandise cannot be supposed to assent to take upon themselves any of these risks unless an express agreement therefor is found in the bill of lading. Instead of creating by construction such an agreement out of the formula of sea perils and accidents of navigation, this court rather holds that

"To give so broad an interpretation to words of exception inserted by the carrier and for his benefit, would be contrary

to settled rules of construction, and would render nugator many of the subsequent stipulations of the bill of lading."

Compania *v.* Brauer, unreported opinion, Oct. 25t p. 9.

For these considerations, it is submitted, that the questio certified should be answered in the negative.

HARRINGTON PUTNAM,
Advocate.

December , 1897.

Appendix.

Opinion of the District Court.

Brown, J.: "On the 14th of July, 1891, while the steamship *G. R. Booth* was discharging her cargo at East Central Pier, Atlantic Dock, Brooklyn, an explosion occurred in the afterhold when the cargo was nearly all discharged, by which the steamer's iron plates on the starboard side were burst through below the water line, in consequence of which the afterhold was flooded with water. The water made its way thence through the bulkhead into the compartment next forward, where the libellant's sugar was thereby wet, damaged and melted, for which damages the above libel was filed.

"Although, upon the contradictory evidence, it is not altogether certain what it was that exploded, it was probably certain cases of "detonators," boxes of which had been stowed in the afterhold, and most, if not all, of which had been already removed to the dock.

"The libellant contends that these boxes of detonators were highly dangerous, and that the ship in stowing them in the lower hold took all risks of explosion and the damages that might be caused thereby. The officers of the ship, however, had no actual knowledge of the shipment of any dangerous explosives; or that these boxes were dangerous, if, indeed, they were so under the ordinary conditions of shipment. They had no mark upon them like "mit vorsicht," such as is usually put upon goods at Hamburg, to indicate that they were to be carefully handled, although they were marked "capsules" and "spreng capseln," and were specified as "detonators" in the bill of lading, terms not appreciated by the officers.

"I do not think that the liability of the vessel in this case is made out. The explosion did no *direct* damage to the sugar, nor in any manner directly affected it. By bursting a hole in the side of the ship sea water was let into the hold, which subsequently made its way among the sugar and damaged it. Such damage is a sea peril. *Xantho*, 12 App. Cas., 503, 508. The burden of proof is upon the libellant to show that it might have been avoided by the ship by reasonable care. Clark *v.* Barnwell, 12 How., 272, 280, 282; Transportation Co. *v.* Downer, 11 Wall., 129; The *New Orleans*, 26 F. R., 44. In other words, the question is one of negligence; and in this case a question of negligence in the reception and stowage of cargo.

"But the evidence is not sufficient to show, or to warrant the inference of, any negligence or lack of customary care on the part of the ship in receiving these boxes, or in stowing them, as was done, with other cargo in the hold, or in the subsequent handling of the cases. The small capsules are so packed in cases, and with such care, as to make it difficult or impossible to produce any explosion by any mode of handling, or by dropping, knocking or pounding. See Majendie's Report. They had been long accustomed to be handled by sea and land as ordinary merchandise is handled, and carried in the same manner. They were not known, or considered, or treated, as dangerous cargo. No previous explosion in transit is shown. Prior to this accident, it was usual to carry them indiscriminately with other cargo. Since this accident it has become customary for steamers to carry them either in the hatches or on the deck, while sailing vessels still stow them below deck.

"In the absence of any proof of knowledge of danger, it is sufficient, on a question of stowage, to stow according to the knowledge and experience of the time and to observe the usages of the time and place. See Baxter *v.* Leland, 1 Blatch., 526; Fed. Cas. No. 1125; Lamb *v.* Parkham, 1 Sprague, 343; Fed. Cas. No. 8020; The *Titania*, 19 Fed., 107, 108; The *Dan*, 40 Fed., 691, 692; The *Dunbritton*, 61 Fed., 764, 766; Carver Carriers by Sea, Sec. 96. This was done by the steamship in this case. Why the explosion occurred in this instance can only be conjectured, viz., from some possible detachment of a portion of the *fulminate* within the capsules, an occurrence previously unknown in transportation, and arising, probably, in the manufacture and packing; certainly not from any fault of the ship. To charge the ship in this case with negligence in care or stowage would be to make her responsible for what was essentially accidental, and altogether contrary to previous experience and usage, which justified the carriage of these boxes in the same manner in which they were carried, even had the officers fully understood their contents.

"The libel must be dismissed, with costs."